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In The

Supreme Court of the United States

CHARLES WILKIE, ET AL.,

Petitioners,

v.

HARVEY FRANK ROBBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE PARAGON FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Paragon Foundation, Inc. is a New Mexico 501(c)(3) non-profit organization created to support and advance the fundamental principles set forth in the Declaration of Independence and Constitution of the United States of America.[1] The Paragon Foundation, Inc. advocates for individual freedom, private property rights, and limited government controlled by the consent of people. The Paragon Foundation, Inc. has several thousand current or former members nationwide.

Amicus' interests lie with ranchers and property owners. Amicus is interested in fair, lawful treatment of all ranchers and property owners by the federal government and its officials without undue or improper interference with private property rights. Consistent with its mission, Amicus is well positioned to bring to the attention of the Court relevant material that will assist the Court in the disposition of this case.

SUMMARY OF ARGUMENT

The court of appeals' judgment should be affirmed. The court of appeals correctly applied *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny in denying Petitioners' qualified immunity defense.

[1] This brief is submitted with the consent of the parties. Pursuant to Rule 37.6, Amicus affirms that no party or their counsel authored, or paid for, this brief in whole or in part. This brief is filed with consent of the parties pursuant to Rule 37.3(a).

In denying Petitioners' qualified immunity defense, the court of appeals found that Respondent had sufficiently alleged that Petitioners violated clearly established constitutional rights under the Fifth Amendment and clearly established statutory rights under the Hobbs Act, 18 U.S.C. §1951 and Wyoming law concerning extortion, giving rise to a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, et seq. Contrary to Petitioners' argument, Petitioners' qualified immunity defense was not merely rebutted by Respondent with allegations of improper motives on the part of Petitioners.

Petitioners' arguments, if successful, would result in a *de facto* merger of the defense of qualified immunity with the defense of absolute immunity. In cases where improper motive is part of plaintiff's affirmative case, legal and factual inquiry is appropriate prior to a final ruling on the defense of qualified immunity.

ARGUMENT

I. THE OBJECTIVE TEST FOR QUALIFIED IMMUNITY SET FORTH IN *HARLOW* AND ITS PROGENY IS NOT AT ODDS WITH RESPONDENT'S SUBSTANTIVE CLAIMS THAT INCLUDE IMPROPER MOTIVE AS AN ELEMENT.

Alexander the Great's sword is not readily available to the parties to cut through the Gordian knot that is qualified immunity. Thus, the Court is again called on to cut that knot. At issue here is the objective test for qualified immunity under *Harlow* and its progeny and its interplay

with the alleged improper motives of Petitioners that constitute an element of Respondent's affirmative case.

From the seminal case of *Harlow* forward, qualified immunity has been a matter of balancing public policy considerations. *Harlow*, 457 U.S. at 813-14. Since *Harlow* was decided in 1982, the Court has addressed the issue of qualified immunity in more than twenty cases.

Harlow held that bare allegations of malice should not subject government officials to suit and that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 817-18. "Under that standard, a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). While "evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of plaintiff's affirmative case." *Id.* at 589. However, *Harlow* did not "delete the state of mind inquiry from every constitutional tort calculus." *Crawford-El*, 523 U.S. at 589, fn. 11 (citing Justice Ginsburg's comments from *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1432 (D.C. Cir. 1987) when she was a judge on the District of Columbia Circuit).

Hartman v. Moore, ___ U.S. ___, 126 S.Ct. 1695 (2006), decided after the court of appeals' decision in this case, is consistent with *Crawford-El*. "[R]etaliation is subject to recovery as the but-for cause of official action

offending the Constitution." *Hartman*, 126 S.Ct. at 1701 (citations omitted). Pleading and proving lack of probable cause in a retaliatory prosecution case is required. *Hartman, supra*. "Probable cause or its absence will be at least an evidentiary issue in practically all such cases." *Hartman*, 126 S.Ct. at 1707.

The "state of mind inquiry" is relevant when a plaintiff must plead and prove malice or improper motive as part of its affirmative case. Thus, an uneasy balance is struck between the objective test of *Harlow* and its progeny and the element of malice or improper motive that constitutes an essential component of certain substantive statutory and constitutional claims.

II. THE COURT OF APPEALS CORRECTLY ANALYZED THE QUALIFIED IMMUNITY DEFENSE UNDER *HARLOW* AND ITS PROGENY, FINDING THAT RESPONDENT SUFFICIENTLY ALLEGED THAT PETITIONERS VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT AND CLEARLY ESTABLISHED STATUTORY RIGHTS UNDER THE HOBBS ACT AND WYOMING LAW, GIVING RISE TO A RICO CLAIM.

Under the broad heading of "Qualified Immunity," the court of appeals divided its discussion into two categories: the Fifth Amendment and RICO. Subsumed under RICO was a discussion of the Hobbs Act and Wyoming law. The court of appeals held that Petitioners' conduct was actionable under the Fifth Amendment and RICO and that Petitioners were not entitled to qualified immunity. Pet. App. 16a, 18a. The court of appeals' holdings should be affirmed.

Under the Fifth Amendment, the court of appeals found that Respondent had the well established right to exclude the federal government from his property and that retaliation by Petitioners for exercise of that right to exclude was actionable. Accordingly, Petitioners were not entitled to qualified immunity on Respondent's *Bivens* claim[2]. Under RICO, the court of appeals concluded that "Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties" and therefore "their conduct is actionable." Further, under RICO, the court of appeals found that Respondent had sufficiently alleged a violation of clearly established statutory rights under the Hobbs Act and Wyoming law concerning blackmail and therefore denied Petitioner's qualified immunity defense.

The court of appeals' decision makes clear that there is an element of alleged improper motive on the part of Petitioners. The court of appeals described that improper motive as "retaliation," "intent to extort," and "accused or threatened to accuse [Robbins] of various crimes to obtain a right-of-way." Pet. App. 15a, 18a, 21a, and 25a. The court of appeals described Petitioners' alleged conduct as "egregious," and supported its view of egregiousness by reference to Respondent's submissions of evidence in the district court. Pet. App. 22a, fn. 5.

The defense of qualified immunity is generally resolved without reference to the substantive constitutional claims alleged against a public official. *Crawford-El*, 523

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[2] *Bivens* claims arise from *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

U.S. at 589. Where improper motive is an element of a substantive constitutional claim, that motive is not strictly relevant to resolution of the qualified immunity defense. *Id.* at 588. However, state of mind inquiries may be relevant to whether Respondent can make out a statutory or constitutional violation in the first instance. *Id.* at 589, fn. 11 (citations omitted).

The court of appeals was careful to avoid the trap of allowing improper motive alone to rebut the defense of qualified immunity. With regard to the *Bivens* Fifth Amendment claim, the court of appeals found a clearly established "Fifth Amendment right to exclude the government from private property" and accordingly found that "the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful." Retaliation implies an improper motive and is an essential element of Respondent's substantive constitutional claim. However, it was the clearly established nature of the Fifth Amendment right to exclude the government from private property and the resulting violation of that right that defeated Petitioners' defense of qualified immunity, not the improper motive of retaliation alone.

With regard to the RICO claims, in denying the qualified immunity defense, the court of appeals concluded that "Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties" and more specifically that Respondent had adequately alleged a violation of clearly established statutory rights under the Hobbs Act and Wyoming law sufficient to support a RICO claim. The improper motive element of Respondent's RICO claim was secondary to the finding that Respondent adequately alleged a violation of clearly established

statutory rights under the Hobbs Act and Wyoming law sufficient to support a RICO claim. Claims under the Hobbs Act and Wyoming law concerning blackmail necessarily include an element of improper motive. The qualified immunity defense should not succeed merely because Respondent has chosen to pursue claims that have an element of improper motive.

It may be argued by Petitioners and Amici in support of Petitioners that the court of appeals abandoned the objective test in *Harlow* and its progeny in favor of a subjective test focusing on the intent of the public official. That is manifestly not the case. The court of appeals was careful to not let improper motive alone rebut the defense of qualified immunity. Moreover, without knowing the outcome of the *Hartman* case at the time, the court of appeals arrived at the correct result under that case given the alleged egregiousness of Petitioners' conduct. *See*, *Hartman*, 126 S.Ct. at 1704, fn. 7 (quoting the underlying court of appeals' decision, "[a] *Bivens* recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus). The court of appeals hewed closely to the objective test for qualified immunity set forth in *Harlow* and its progeny and did not give the element of improper motive inherent in Respondent's claims dispositive effect in its qualified immunity analysis.

III. PETITIONERS' ARGUMENTS, IF SUCCESSFUL, ELIMINATE THE DISTINCTION BETWEEN QUALIFIED IMMUNITY AND ABSOLUTE IMMUNITY.

Petitioners' arguments on the defense of qualified immunity, if successful, would result in a *de facto* merger of the defense of qualified immunity with the defense of absolute immunity. The distinction between the two immunities would be meaningless. Resolution of the defense of qualified immunity would turn on a bare legal inquiry largely divorced from the facts of a case. However, there must be some weight given to the facts developed by Respondent and submitted as evidence to the district court which the court of appeals described as showing the "egregious nature of [Petitioners'] alleged conduct." Qualified immunity if it is to mean something other than absolute immunity must involve a legal and factual inquiry.

Quick judicial resolution of the qualified immunity defense without resort to factual inquiry would further the goal of early termination of insubstantial lawsuits but at the cost of depriving certain valid claimants of relief. However, that policy is at odds with Justice Marshall's comments in *Marbury v. Madison*, 5 U.S. 137, 163 (1803): "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Likewise, *Bivens* claims would be gutted; constitutional violations by public officials would go undeterred and uncompensated. Finally, the curious effect of merging qualified immunity with absolute immunity *sub silencio* is that there cannot be effective public debate on the issue and therefore no

legislative fix for what appears to be an intractable judicial problem.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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